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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE CASIQUE,

Defendant and Appellant.

B188373

(Los Angeles County
Super. Ct. No. NA067592)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur Jean, Jr., Judge. Affirmed.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Ryan B. McCarroll, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant does not challenge his convictions for burglary and uttering fictitious checks, which purported to be payroll checks issued by the Las Virgenes Municipal

Water District. But he does challenge his two-strike sentence which was based on a doubled upper term on the burglary count and resulted in a six-year prison term. Appellant argues the trial court violated the U.S. Supreme Court's *Apprendi-Blakely-Booker*¹ rule when the judge rather than a jury made the findings his crimes were becoming more and more numerous and that he was simply “victimizing the community at every turn,” thus justifying imposition of the high term. Appellant concedes the California Supreme Court in its 2005 decision, *People v. Black*,² held the California sentencing scheme is consistent with these U.S. Supreme Court constitutional rulings. He further concedes he makes this challenge only “to preserve it for federal review.” He also observes such federal review is likely to take place in the context of the U.S. Supreme Court's disposition of *People v. Cunningham* in which the nation’s high court granted certiorari on February 21, 2006.³

This Court has heard several cases since the grant of certiorari in *Cunningham* which raised the same *Apprendi-Blakely-Booker* issue as Appellant raises here. In some of those cases we were able to conclude any reasonable jury would be compelled to make the same factual finding as the trial judge did and thus find any such error probably would be harmless under *Washington v. Recuenco*.⁴ But we are unable to reach such a conclusion here. Thus, in this case we are not able to hold such error -- if it ultimately is deemed to be error -- would *necessarily* be harmless on that basis.

On the other hand, another ground for rejecting appellant’s claim, not urged by respondent, is present here. The court’s finding appellant’s crimes were becoming “more and more numerous” appears to base the imposition of the upper term on a finding

¹ *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Blakely v. Washington* (2004) 542 U.S. 296; *United States v. Booker* (2005) 543 U.S. 220.

² *People v. Black* (2005) 35 Cal.4th 1238.

³ *Cunningham v. California*, No. 05-6551 [126 S.Ct. 1329, 164 L.Ed.2d 47].

⁴ *Washington v. Recuenco* (2006) 126 S.Ct. 2546, 165 L.Ed.2d 466.

appellant had incurred prior convictions, of which there indeed were many.⁵ As presently construed the *Apprendi-Blakely-Booker* rule permits a trial court to make such a finding without a jury and use that finding as an aggravating factor to enhance a defendant's sentence. Succinctly stated, that rule declares, "*Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.*"⁶

The probation report before the trial judge listed all of appellant's prior convictions. By reciting as a factor in aggravation those convictions were numerous, the court was making the fact of appellant's prior convictions the basis for imposing the upper term sentence. Thus, even if interpreted as a factual finding "that increases the penalty for a crime beyond the prescribed statutory maximum," it appears to be a permissible finding for the judge rather than the jury under the U.S. Supreme Court's jurisprudence. Consequently, unless the nation's high court eliminates the "prior conviction" exception, along with holding the California sentencing system violates the federal Constitution, appellant cannot succeed in appealing this sentence. Nonetheless, in an abundance of caution, we qualify our affirmance by explicitly permitting appellant to pursue any recourse still available after the U.S. Supreme Court decides the *Cunningham* case.⁷

⁵ Although a number of appellant's earlier crimes resulted in juvenile adjudications rather than adult criminal convictions, his record reflects his commission of no less than 20 felonies. That appears "numerous" indeed.

⁶ *Apprendi v. New Jersey*, *supra*, 530 U.S. 455, 490, italics added.

⁷ Respondent contends appellant waived any *Apprendi-Blakely-Booker* error by not objecting on that ground in the trial court, even though his sentencing hearing occurred over a year after the *Blakely* opinion had been issued by the U.S. Supreme Court. The obvious defect in this position is that by the time of appellant's sentencing hearing, January 5, 2006, the California Supreme Court had issued *People v. Black*, thus rendering any such objection futile – at least in the California courts. Appellant cannot be faulted for failing to make futile objections. And by failing to object at that point he certainly cannot lose his right to raise the issue later in the proceedings when it regains some potential viability.

DISPOSITION

The judgment is affirmed, without prejudice to appellant's entitlement to raise the *Apprendi-Blakely-Booker* issue in an appropriate manner should the United States determine the California sentencing structure violates the U.S. Constitution.

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JOHNSON, Acting P. J.

We concur:

WOODS, J.

ZELON, J.